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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

78-
No. 1441

EDWIN DAVID BANTA and GEORGE HOHMANN,
Petitioners,

v.

FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, et al.,
Respondents.

SUPPLEMENTAL BRIEF

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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This brief is submitted by Petitioners Edwin David Banta and George Hohmann, pursuant to Rule 24 of the Rules of the Supreme Court of the United States, in support of their previously filed Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Petitioners wish to call the Court's attention to and argue the pertinence of this Court's own decision in the case of *County of Los Angeles v. Davis*, — U.S. —, 47 U.S. Law Week 4317, decided on March 27, 1979, after the filing of the Petition in the instant case.

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The Court's Holding in *Davis*

In *County of Los Angeles v. Davis*, one of the questions presented was "whether the imposition of minimum hiring quotas for fully qualified minority applicants is an appropriate remedy in this employment discrimination case." 47 U.S. Law Week at 4318. This question arose in a factual situation where the County had proposed to hire applicants for employment in a manner which would have had a disparate impact on blacks. The plan, however, was abandoned when objected to by minority representatives. 47 U.S. Law Week at 4318. No one was actually hired as a result of this plan.

In the opinion for the majority holding the case moot, Mr. Justice Brennan stated:

> "Indeed, it is extremely doubtful, from this record, that the 1972 proposal had any discriminatory effects to redress. The plan, it must be remembered, was never carried out. As a consequence, there has been no finding that any minority job applicant was excluded from employment as a result of the proposal." 47 U.S. Law Week at 4319.

In his dissenting opinion Mr. Justice Stewart concluded in an even stronger statement:

> "It is clear, however, that the only violation remaining in this case, the threatened use of the 1972 test to rank job applicants, cannot justify the extensive remedy ordered by the District Court. 'As with any equity case, the nature of the violation determines the scope of the remedy.' *Swann v. Charlotte-Mecklenburg Bd. of Edu.*, 402 U.S. 1, 16. A simple order enjoining the illegal use of the 1972 test would seem sufficient to remedy the only violation of which respondents had standing to complain." 47 U.S. Law Week at 4320.

Mr. Justice Powell agreed, "I am in agreement with Mr. Justice Stewart that regardless of the proper construction of § 1981 the only arguably illegal conduct in this case could not justify the sweeping remedy ordered by the District Court." 47 U.S. Law Week at 4323 n. 12.

The Pertinence of *Davis* to the Instant Petition

The Petition in this case presents the identical question which the Court was not able to decide in *Davis* because of mootness, with the exception that promotion rather than hiring is at issue here. That the Court recognizes the importance of the issue is patent, since the Court granted certiorari to review it. The fact that all nine Justices seemed to be in agreement that the quota remedy granted in *Davis* was not appropriate, should compel the Court to grant certiorari here and reverse the absolute preference accorded to the minority candidates for promotion by the Eighth Circuit.

While Petitioners fully expect the Government to argue the propriety of the Eighth Circuit's action and the inappropriateness of this case as a vehicle for further illuminating the law of remedies in Title VII cases, the fact remains that the absolute preference in promotions ordered in this case goes far beyond what any other court has sanctioned in a testing situation. To allow the Eighth Circuit's order to stand without any comment would be to grant a roving commission to the Courts of Appeals to ignore the discretion of district court judges in formulating remedies and would provide an open invitation to courts to expand the scope of available "remedies" far beyond any intention ever expressed by Congress.

To paraphrase the majority and minority opinions in *Davis*:

> Indeed, it is extremely doubtful, from this record that the 1974 Fire Captain Promotional Examination had any

discriminatory effects to redress. Promotions based on the test results, it must be remembered, were never carried out. As a consequence, there has been no finding that any minority candidate was excluded from promotion as a result of the test.

And,

It is clear, however, that the only violation remaining in this case, the threatened use of the 1974 test to rank candidates for promotion, cannot justify the extensive remedy ordered by the Court of Appeals. A simple order enjoining the illegal use of the 1974 test would seem sufficient to remedy the only violation of which Plaintiffs had standing to complain.

CONCLUSION

In light of this Court's decision in *County of Los Angeles v. Davis*, and for the reasons previously stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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